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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1967.

No. ...502

BROTHERHOOD OF RAILROAD TRAINMEN,
Petitioner,

v.

CERTAIN CARRIERS REPRESENTED BY THE EASTERN, WESTERN AND SOUTHEASTERN CARRIERS CONFERENCE COMMITTEES, THE TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS,
Respondents.

PETITION

For a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

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For a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

To the Honorable Earl Warren, Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The Brotherhood of Railroad Trainmen prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this case on May 12, 1967, petition for rehearing denied June 7, 1967.

OPINIONS BELOW.

The opinion of the District Court is not reported. It appears at R. 119-21 below. The opinion of the Court of Appeals (Appendix A, *infra*) is not yet officially reported. It is unofficially reported at 65 L. R. R. M. 2257. It is appended hereto as Appendix A.

JURISDICTION.

The judgment of the Court of Appeals was dated and entered May 12, 1967 (R. 200), and is appended hereto as Appendix B, *infra*. A petition for rehearing was filed May 26, 1967, and was denied June 7, 1967 (Appendix C). The jurisdiction of this Court is invoked under 28 U. S. C., § 1254 (1). (Appendix D.)

QUESTIONS PRESENTED.

1. Whether the arbitration board created by Public Law 88-108 to arbitrate and resolve two railroad "work rules" disputes, still exists and retains jurisdiction for the purpose of ruling on disputes over the interpretation or application of its award, even though the statute creating it by its own terms has expired.

2. If the answer to Question 1 is in the negative, whether the respondent violated the award of the arbitration board in depriving certain employees of employment under certain conditions. The District Court held that the award and prior interpretations raised a "necessary inference" that respondent's action was authorized; the Court of Appeals disagreed but did not rule on the validity of respondent's conduct, holding that the question should be submitted to the arbitration board and that the board retained power to pass on it.

(The Court below did not pass on this second question. If the writ is granted and this Court holds that the arbi-

tration board established by the expired statute no longer has power to issue rulings, this Court may either itself adjudicate Question 2 or remand it to the Court of Appeals for adjudication.)

STATUTES INVOLVED.

The pertinent provisions of Public Law 88-108 (77 Stat. 132; 45 U. S. C. (Supp.), § 157) and the Railway Labor Act (45 U. S. C., §§ 151 et seq.) are set forth in Appendix D, *infra*.

STATEMENT.

On August 28, 1963, Congress enacted Public Law 88-108 providing for compulsory arbitration of two "work rules" disputes on the railroads, the "firemen on diesels" issue and the "crew-consist" issue. It is the latter issue that is here involved. It pertains to the minimum size of crews in train service and in switching service, not including engine service. The Act established an arbitration board (subsequently known as "Arbitration Board No. 282") which made an award to take effect January 25, 1964, and to remain in effect for two years, pursuant to the provisions of Sections 4 and 5 of Public Law 88-108. The Act provided that the award should remain in effect for such period as the arbitration board should determine, not exceeding two years (Sec. 4). The Act also provided (Sec. 8) that the Act should expire 180 days after its enactment except that it should remain in effect for the purposes of Section 4 for the period provided for in Section 4 (two years from January 25, 1964).

The award made provision for reductions in crew consist but provided employment protection for "protected employees" as defined therein. The Act provided that the arbitration should be conducted in accordance with Sections 7 and 8 of the Railway Labor Act. The board

was reconvened from time to time during the two-year period to issue interpretations of its award.

Pursuant to Public Law 88-108 the District Court entered an order making the award the judgment of the Court. On January 17, 1966, petitioner filed in that case in the District Court a motion for supplemental relief against respondent railroad, urging that respondent had violated the award by depriving "protected employees" of employment guaranteed by the award by operating with reduced crews other than when permitted by the award (R. 20-21). The District Court denied the motion on the ground that there was a "necessary inference or implication" from prior interpretations of the board that the carrier was authorized by the award to do what it did (R. 120, 184).

The Court of Appeals disagreed that there was such necessary inference. But it affirmed the denial of the motion for supplemental relief on the ground that the issue was one within "the specialized background of knowledge, experience, and understanding of the Board" (R. 186) and that the issue called for "the sensitized judgment, enlightened by prior experience in comparable situations, of the Arbitration Bo rd" (R. 188). It held that although the award of the board and the statute that created the board and provided for its functioning had both expired, the board "retains similar power to pass upon differences arising out of the contentions of these parties as to the meaning of application" of the award with respect to action taken during the period of the award (R. 189; Appendix A, p. 10a). The question of the continuing jurisdiction of the arbitration board to make such adjudications after the expiration of the statute creating it was not briefed or argued but arose during oral argument in the Court below. A petition for rehearing was filed on that ground, but was denied (Appendix C, p. 11a).

REASONS FOR GRANTING THE WRIT.

The decision below raises far-reaching questions not only about the continued existence and jurisdiction of the arbitration board after the expiration of the Act of Congress that established it, but by necessary implication the continued existence and authority to function of any agency of the United States after the expiration of the statute establishing the agency. In effect, it holds that when Congress creates an agency with a limited life, under a statute with a limited life having an automatic expiration date, to make specified adjudications, the agency continues to exist for the purpose of making such adjudications of disputes after the period of the life of the statute.

The only authority the Arbitration Board has, to do anything, is Public Law 88-108 which established it and prescribed what it was to do and how it was to do it. But that Law by its own terms has long since expired, and so any authority the arbitration board has, to do anything, is under a statute that is no longer operative. Yet the Court below held that such agency may continue to function.

There have been, of course, and are, many disputes over the proper application of the award of the arbitration board. Many were submitted to it during its life, and many were decided during its life. It has not decided any since its expiration, and those submitted to it during its life and not decided, and others, remain undecided.

The Court below would have Arbitration Board 282 continue to exist as long as there may be a "controversy over the meaning or application" of its award for it to "pass upon" under Section 7 Third (c) and Section 8 (m) of the Railway Labor Act (App. D, p. 12a). That Congress did not so intend is attested by the following provisions of Public Law 88-108. It did not create Board 282 as a continuing agency of the United States like the

Interstate Commerce Commission, the National Mediation Board, etc. It was created as a board of seven persons to accomplish a single purpose, i. e., to make a final decision as to the disposition to be made of two disputes which existed under the Railway Labor Act as a result of two specific notices, "the carriers' notices of November 2, 1959" and the "organizations' notices of September 7, 1960" as subsequently implemented. Sections 2 and 3, Public Law 88-108 (App. D, p. 13a). It was required to do so within ninety (90) days. Section 5, Public Law 88-108 (App. D, p. 14a). The law itself expired 180 days after it was enacted, except for such additional time as might be necessary to sustain the award of the arbitration board for which it provided, but not to exceed two years from the effective date of the award. Sections 4, 5 and 8, Public Law 88-108 (App. D, pp. 13a and 14a).

Public Law 88-108 provided that the arbitration board should, to the extent not inconsistent with that statute, conduct its proceedings in accordance with Section 7 of the Railway Labor Act, and Section 7 Third (c) of that Act provides for an arbitration board established by agreement to issue interpretations of its award. To that extent, it may be argued that Public Law 88-108 "incorporates" Section 7 of the Railway Labor Act and the Railway Labor Act, it may be argued, has not expired. But any such authority, arising from "incorporation" of a part of the Railway Labor Act, must have expired with the expiration of the incorporating statute.

The very same Court below, under the very same statute here involved, has decided that no further steps may be taken under the statute and award to eliminate further jobs. Indeed, it held that procedures initiated during the life of the award, under procedures established by the award to reduce the size of crews, could not be continued after the expiration of the award, for after that time there was no authority for further affirmative action under the award. *Brotherhood of Railroad Trainmen, et al. v.*

Akron & Barberton Belt R. Co., et al., Nos. 20,102 etc., decided May 12, 1967, the same day as the decision below in this case, by a different division of that Court, Supplemented July 31, 1967. (Not yet reported, affirming on this issue, 250 F. Supp. 691, 696-7 (1966).) It is difficult to understand why some procedures under an expired statute and its award have expired with the expiration of the statute and award even though initiated during their life, while other procedures may still be utilized even though not yet initiated,—at least in the absence of explicit statutory differentiation, of which there is none here involved.

It has been repeatedly held that the jurisdiction of a tribunal established by Congress, including a court, expires with the expiration of the statute establishing it, at least in the absence of an express savings clause. *Ex Parte McCardle*, 7 Wallace 506 (1869); *Carpenter v. Wabash Ry.*, 309 U. S. 23 (1940); *Hines v. Davidowitz*, 312 U. S. 52 (1941); *American Steel Foundries v. Tri-City Central Trades Council*, 257 U. S. 184 (1921); *Bruner v. United States*, 343 U. S. 112 (1952); *Brotherhood of Railroad Trainmen v. Denver & Rio Grande Western R. R.*, 370 F. 2d 833 (10th Cir. 1966), cert. den., April 24, 1967 (35 Law Week 3375). Here of course there is no savings clause. Savings clauses apply to cases then pending, and here there was no proceeding pending before the board upon the expiration of the statute. In the case last cited, and some of the others, the District Court had jurisdiction to do what it did when it did it, but the Court of Appeals held that what the District Court did was a nullity because pending appeal that jurisdiction of the District Court had expired, and this Court denied a petition for a writ of certiorari. The decision below in this case flies in the teeth of the teaching of those cases. Also, in those cases the tribunal continued to exist but its jurisdiction of the subject matter terminated. Here, the statute authorizing the tribunal to exist itself has expired.

So long as the decision below stands unreviewed by this Court, there can be nothing but chaos concerning the authority of a tribunal to exercise jurisdiction under an Act of Congress conferring jurisdiction after the termination of the statute conferring the jurisdiction. We suggest that the decision below in this case, creating the problem, is the decision to be reviewed else chaos reign on this subject for an indeterminable period.

Of even more immediacy, if the decision below is not reviewed and the arbitration board resumes and continues issuing interpretations as the Court below held it must, and it is later held that the board had no jurisdiction because both it and the enabling statute had expired, the rights of thousands of railroad employees and numerous railroads would probably have been irretrievably damaged.

It is urged that this petition for a writ of certiorari be granted.

Respectfully submitted,

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APPENDIX A.

Opinion Below.

Before Bazelon, *Chief Judge,* Edgerton, *Senior Circuit Judge,* and Coffin,* *Circuit Judge* for the United States Court of Appeals for the First Circuit.

Coffin, *Circuit Judge:* This appeal centers about the propriety of the district court's view that a complex question of job protection of certain railroad employees was answered by the prior interpretations of Arbitration Board No. 282, compelling the Court to deny a motion of appellant, the Brotherhood of Railroad Trainmen (BRT) for supplemental relief. While we agree with the action taken in denying the motion, we do so for a different reason. We do not construe the prior interpretations of the Board as determinative of the issue raised; rather, we think this case presents a question of interpretation of the award within the primary jurisdiction of the Board.

This is another chapter in the elaborate history of the controversy between railroads and railroad employee unions over eliminating certain provisions in collective bargaining agreements calling for firemen in engine crews and a stipulated number of employees in train and yard crews. In 1963, after the procedures of the Railway Labor Act had been exhausted, a threatened nation-wide strike was averted by the passage of P. L. 88-108, 77 Stat. 132, 45 U. S. C., § 157, which created Board No. 282 to provide for "final disposition" of both the "fireman issue" and the "crew consist issue" by compulsory arbitration.

The Board issued its award on November 25, 1963, effective January 25, 1964. By its own terms and by the terms of the underlying law, the award was to continue in force for two years thereafter.

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* Sitting by designation pursuant to Section 291 (a) Title 28 U. S. Code.

Shortly after the issuance of the award, the appellee, Terminal Railroad Association of St. Louis (Terminal), served on BRT a notice proposing a reduction in the minimum number of persons required for a crew by the existing collective bargaining agreement. The notice referred to 106 crews out of an average number ranging from 170 to 190. Under the provisions of the basic award, a Special Board of Adjustment was appointed to apply relevant guidelines to the factual circumstances relating to the operation of the crews in question. The Special Board denied Terminal's proposals to reduce two specific crews, and to reduce all extra and subsequently established crews, but granted its proposals to reduce by one person all other listed crews. It refrained from giving procedural advice as to future questions of compliance but made clear that Terminal in carrying out its proposed reduction of crews must comply with the provisions of the basic award (III-D) relating to employee protection.

The entire section on employee protection is printed in the margin.[1] Terminal argues that, when it discontinues

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[1] "Part D—Employee Protection

"D (1). Road trainmen and yard brakemen or helpers, other than those on furlough on the date that this Award becomes effective, shall be known and designated, for the purposes of this Award, as 'protected employees'.

"D (2). A 'protected employee,' known and designated as provided in paragraph D (1) of this Award, shall retain his rights to and obligations to protect road and yard service assignments (including all assignments in miscellaneous and unclassified road services and all assignments in transfer, belt line, and miscellaneous yard services) for which he is qualified, as provided by rules in effect on the day preceding the day this Award becomes effective, to the extent that such positions are available to him in his seniority district, unless and until retired, discharged for cause, or otherwise removed from the carrier's active working lists of road trainmen and yard brakemen or helpers by natural attrition; provided, that no such 'protected employee' shall have any right to jobs or positions that the carrier may discontinue pursuant to the provisions of this Award if other employment in any such classes of service, for which such employee is qualified, is available

positions that the Special Board of Adjustment authorized it to discontinue and transfer protected employees to the "extra board" for allocation to extra crews to meet traffic needs and fill vacancies in regular crews, this service on extra crews constitutes the required "other employment" which satisfies the employee protection clause of the award. Terminal asserts that the extra crews are being operated as they have been in the past and that personnel on these crews have reasonably stable employment, as the existence of substantial charges for overtime work of the extra crews indicates. BRT, on the other hand, argues that only three "nonprotected" employees serve on the extra crews, that the extra crews have been doubled in size, and that substantial numbers of protected employees who formerly worked on a full five-day week have found themselves working less than a full week.[2] BRT urges that the proper

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to him in his seniority district. If and when the carrier is required to create new jobs or positions for road trainmen or yard brakemen or helpers, pursuant to the provisions of this Award, such positions shall first be filled, to the extent available, by 'protected employees' then filling positions which the carriers would otherwise have the right to abolish or eliminate pursuant to the provisions of this Award, before such jobs or positions may be claimed by other employees of the carrier in accordance with their seniority rights."

[2] Appellant in its brief presents a concise explanation of the twofold effect of (a) having a larger "extra board" available to (b) fill a smaller number of vacancies. This is its description of the impact of the Special Board Award on Terminal's Eleventh Street District:

"In that District there were 13 regular jobs, for which there were regular relief crews sufficient to do the work of those jobs on the regular crews' two days off per week. Under the collective bargaining agreement, each of two of those jobs required a foreman and a minimum of 3 helpers and the other 11 crews each required a foreman and a minimum of 2 helpers. It therefore required 13 foremen and a minimum of 28 helpers to man the regular crews, not counting the relief crews. Assuming that there were 50 employees in the district, 41 of them, those with the most seniority, would be regularly assigned to those 41 positions. The remaining 9 employees would therefore be 'extra men' and constitute the 'extra board'. These men were paid only if they worked in a temporary vacancy due to the temporary absence of 1 or

construction of the employee protection guarantee is that, on any day when a protected employee is not needed on an extra crew, he should be assigned to a position in a regular crew (which existed under rules established prior to the award) even though Terminal has been allowed to discontinue and has in fact discontinued that position.

The district court, in denying BRT's "motion for supplemental relief",[3] gave as its reason the following:

> "While Board 282 has not expressly passed upon the question as to whether the men on the extra list are entitled to such assignments which carrier denies, and although the question is not as clear as counsel seem to argue, the Court is of the opinion that there is a necessary inference of implication from the various answers and interpretations that Board 282 has already made, that these men are not entitled to be assigned to vacancies that may arise from day to day by reasons of absence for any reason of the men who are composing the actual crews that are being operated in yard service."

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more of the 41 employees theretofore assigned to the 13 regular crews or to one or more of the employees assigned to a regular relief crew or to man an 'extra' crew. Assignments of 'extra men' to temporary vacancies and to 'extra' crews was and is on the basis of seniority among the 'extra men'. A reduction of one helper in each of 13 crews necessarily results in each of 13 employees becoming an 'extra man' with more seniority than any of the 9 'extra men' theretofore on the 'extra board'. The 'extra man' who previously was number 1 on the 'extra board' thus becomes number 14 and the 'extra man' who formerly was number 9 on the 'extra board' thus becomes number 22 and the possibility for work in temporary vacancies in the reduced crews is reduced from the number of vacancies which may occur among 41 men to those which may occur among 28 men."

[3] BRT's motion sought an order that Terminal "cease violating" the award of Board 282 and that it pay compensatory and punitive damages to its employees who were not permitted to work on discontinued jobs on days when other employment was not available. In the alternative, the motion sought rescission of the order enjoining BRT and its members from striking over disputes as to the meaning or application of the award.

The court denied the motion, but without prejudice to its renewal if the question of the rights of "protected" employees were submitted to Board No. 282 and a different conclusion were reached by that Board.

Our difference with the district court is that the record does not, in our opinion, allow us to say that prior Board responses have raised a "necessary inference" dispositive of this case. Moreover, as the areas of our doubt indicate, it is much more desirable that the Board, which has so painstakingly erected this edifice of rules and practice, be given the opportunity of applying the finish than that a court be invited to wield its awkward trowel.

The source of the "necessary inference" lies in several questions of interpretation put by both carriers and unions to the Board, covering both "crew consist" and fireman problems. Since the provisions of the award relating to firemen differ substantially from those relating to trainmen and yardmen,[4] we consider first the precedents directly relating to "crew consist" questions. Terminal urges that the Board's answers to three BRT questions, Nos. 24, 26 (a), and 39, define the extent of the protected employees' rights in this case. BRT Question No. 24 asked if a carrier was permitted to reduce crews and force protected employees to extra boards even though such employees might not be paid on any day when such extra work is not provided. This question would seem to cover the issue in this case; but the Board's answer was Delphic. It said, *in toto:*

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[4] On our analysis, it is not necessary to decide whether the different treatment of the two classes is significant as far as the issue in this case is concerned. But we would note that Section II of the award seems to go further in abolishing firemen (helpers) positions and in terminating the employment of some categories of firemen (helpers) than does Section III, dealing with the "crew consist" issue. We note also a separate provision calling for the adjustment of "extra" lists for firemen, a provision absent in the section dealing with the yard and trainmen.

"*Answer:* The carrier is permitted to make reductions in crew sizes pursuant to awards from special boards under Section III by placing 'protected employees' on the extra board to meet the needs of the board, provided that such reduction does not increase the size of the extra board above that established by rule, practice, or agreement. It is provided further that in the event of a subsequent decrease in the extra board because of a loss of business, men previously transferred to the extra board as a result of blanking of jobs shall be returned to regular assignments before any 'protected employee' on the extra board is laid off."

It should be noted, first, that, as BRT points out, this question and answer referred to a "regulated" extra board, where the size was so regulated as to guarantee reasonably full time employment by men on the board. That is, if men, taking work on a first in-first out basis, work less than a stipulated number of miles or days, some men are laid off so that those remaining can approach the stipulated amount of work. This kind of board differs from the seniority board in this case, with the result that the second sentence of the Board's answer is inapplicable.

But there remains a more substantial problem in applying the Board's answer to BRT Question 24 to this case. For it talks in terms of permitting reductions in crew sizes and placing "protected employees" on the extra board "to meet the needs of the board". It further spells out a proviso that "such reduction does not increase the size of the extra board above that established by rule, practice, or agreement". The record before us reveals on the one hand BRT's assertion that Terminal's extra board has been doubled and that substantial numbers of "protected employees" did not work on many days when extra board work ran out. On the other hand, Terminal asserts that the size of its extra board has never been subjected

to any rule, practice, or agreement. Terminal also avers that it has tried to provide reasonably stable employment for its protected employees on the extra board. It points to the fact that it has not yet discontinued 14 of the 104 positions subject to elimination and that it has had to pay overtime for a significant number of shifts because it had fully utilized extra board personnel.

We take it, both from the Board's answer to BRT Question No. 24 and from its clarification of an answer relating to a firemen issue question—as we shall note, *infra*—that the essential prerequisite to effectuating reductions in positions is that a carrier shall not "play games" with the size of its extra board. If a carrier could, without restraint, arbitrarily shift "protected employees" to an extra board and meet the "other employment" requirement of the award, there would indeed be no protection for the "protected". Terminal, of course, does not so argue. But we are not in the position where we can pass judgment on this vital issue. Nor do we think we should be so even though the evidence might be, as it is not, sufficient. This is the type of issue which is peculiarly within the specialized background of knowledge, experience, and understanding of the Board.[5]

The Board's answers to BRT's Questions Nos. 26 (a) and 39 do not bridge the gap we have just discussed. The answer to 26 (a) merely said that a "protected employee", assigned to an extra board, must be allowed to fill a position scheduled for elimination, but not yet eliminated, if his extra board work would not otherwise employ him on a given day. The converse problem was faced in answering No. 39 when the Board said that a different situation was posed by a carrier's discontinuing a position and then refusing to fill it with a "protected

[5] All that we have said concerning the Board's answer to BRT Question No. 24 applies to another question (SUNA Question No. VIII) which raised the same issue.

employee", the Board making the point indirectly that there could be no "vacancy" in a position which no longer existed. This lends partial support to Terminal, but not enough for us to resolve the question, since the proviso we have noted—the rules of the game with reference to the size of the extra board—was in no way alluded to.

We find the same Board philosophy expressed in its answers to questions relating to firemen—which, we have observed, may involve somewhat different and less protective considerations. Even here, however, the key Board response lay in its "clarification" of answers to questions from Southern Pacific Company, No. 1 (e), and Brotherhood of Locomotive Firemen and Engineers, No. 2, both of which asked whether a carrier had to reopen a position it had discontinued to a protected fireman (helper) if failure to do so would cause him to lose work. As in its answer to BRT's Question No. 39 on the crew consist issue, the Board said that there could not be a "vacancy" in a position which had been discontinued. But, to guard against abuse of the right to assign protected classes of firemen to extra service, the Board stated that the carrier "shall be governed by the principle that men on the extra board shall have work opportunity reasonably comparable to that afforded men on the extra board prior to the Award". It said, further, that nothing in the award or in any interpretations "was intended to work an undue forfeiture upon . . . [the protected classes of] firemen-helpers on extra boards . . . The question of what constitutes an undue forfeiture must be determined by the facts of the specific case."

Here again we say not only that we do not have enough facts to determine whether there has been an "undue forfeiture" but that the determination must be made in the first instance by the Board. The regulatory structure as we see it is delicately tuned. It is one which seeks to respond to the carrier's desire to eliminate unneeded

positions while it also seeks to ease the impact of transition on employees. The balance is struck with a combined authority to eliminate regular positions and an obligation so to manage extra boards that in general "protected employees" on the extra board fare about as well as before. The "about as well" element may not be quite equivalent to prior regular work but must not drop too far below it. The judgment which should be brought to bear on this balancing act should be the sensitive judgment, enlightened by prior experience in comparable situations, of the Arbitration Board. That such is not only a dictate of common sense but also of the law we have had previous occasion to say. *Brotherhood of Railroad Trainmen v. Certain Carriers*, 1965, 121 U. S. App. D. C. 230, 349 F. 2d 207; *Brotherhood of Railroad Trainmen v. Chicago, M., St. P. & P. R. R.*, 1965, 120 U. S. App. D. C. 295, 345 F. 2d 985.

In oral argument BRT's only avowed reason for coming to court for simple enforcement of the award, rather than to the Board for interpretation, was that it did not think the award ambiguous. We have attempted to show wherein there was a gap to be filled with the help of the Board's experience. In addition, it was suggested that there was some doubt whether the Board continued to exist or had jurdisdiction to interpret its own award after the expiration of the award in January 1966. We must take cognizance of this question, if the parties are not to be left in limbo.

We think that both in reason and in law Arbitration Board No. 282, despite the statutory limitation on the period to be governed by its award, must have the power to make its award effective during that period by interpretation. We find support for this view in P. L. 88-108 itself. Section 4 provides that "To the extent not inconsistent with this joint resolution the arbitration shall be conducted pursuant to sections 7 and 8 of the Railway

Labor Act, the board's award shall be made and filed as provided in said sections and shall be subject to section 9 of said Act. . . ." Referring to section 8 of the Railway Labor Act (45 U. S. C., § 158), we note that while paragraph (j) requires a specific limitation on "the period during which the award shall continue in force", paragraph (m) provides that "any difference arising as to the meaning, or the application of the provisions, of an award made by a board of arbitration shall be referred back for a ruling to the same board. . . ." We see no reason why this sensible provision can be said to be "inconsistent" with the objectives of P. L. 88-108, and therefore we hold that Arbitration Board 282 retains similar power to pass upon differences arising out of the contentions of these parties as to the meaning or application of Section III-D of the award. Congress, seeking "a complete and final disposition", must have intended that the Board's interpretations must determine the boundaries of rights, privileges, and obligations of the parties with respect to the two-year period specified. It could not have intended that an hiatus exist as to this period, or, alternatively, a mixed application of Board and court rulings.

Affirmed.

APPENDIX B.

Appeal from the United States District Court
For the District of Columbia.

Before: Bazelon, Chief Judge; Edgerton, Senior Circuit Judge; and Coffin,* Circuit Judge for the United States Court of Appeals for the First Circuit.

Judgment.

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof It is ordered and adjudged by this Court that the order of the District Court appealed from in this cause be, and it is hereby, affirmed.

It is further Ordered by the Court that appellee herein recover from appellant its taxable costs on this appeal, and have execution therefor.

Per Curiam

Dated: May 12, 1967

APPENDIX C.

Before: Bazelon, Chief Judge; and Edgerton, Senior Circuit Judge; and Coffin, Circuit Judge, in Chambers.

Order (Filed June 7, 1967).

On consideration of appellant's petition for rehearing and of appellee's answer thereto, it is

Ordered by the court that appellant's aforesaid petition is denied.

Per Curiam.

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* Sitting by designation pursuant to Section 291 (a), Title 28, U. S. Code.

APPENDIX D.

Judicial Code.

28 USC 1254 (1), 62 Stat. 928.

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

Railway Labor Act, Sec. 7 Third (c).

(c) **Duty to reconvene; questions considered.**

Upon notice from the Mediation Board that the parties, or either party, to an arbitration desire the reconvening of the board of arbitration (or a subcommittee of such board of arbitration appointed for such purpose pursuant to the agreement to arbitrate) to pass upon any controversy over the meaning or application of their award, the board, or its subcommittee, shall at once reconvene. No question other than, or in addition to, the questions relating to the meaning or application of the award, submitted by the party or parties in writing, shall be considered by the reconvened board of arbitration or its subcommittee.

Such rulings shall be acknowledged by such board or subcommittee thereof in the same manner, and filed in the same district court clerk's office, as the original award and become a part thereof.

* * * * * * * *

Railway Labor Act, Sec. 8 (m).

(m) Shall provide that any difference arising as to the meaning, or the application of the provisions, of an award

made by a board of arbitration shall be referred back for a ruling to the same board, or, by agreement, to a subcommittee of such board; and that such ruling, when acknowledged in the same manner, and filed in the same district court clerk's office, as the original award, shall be a part of and shall have the same force and effect as such original award; and

* * * * * * *

Public Law 88-108.

"Sec. 2. There is hereby established an arbitration board to consist of seven members.

* * * * * * * *

"Sec. 3. The arbitration board shall make a decision, pursuant to the procedures hereinafter set forth, as to what disposition shall be made of those portions of the carriers' notices of November 2, 1959, identified as 'Use of Firemen (Helpers) on Other Than Steam Power' and 'Consist of Road and Yard Crews' and that portion of the organizations' notices of September 7, 1960, identified as 'Minimum Safe Crew Consist' and implementing proposals pertaining thereto. The arbitration board shall incorporate in such decision any matters on which it finds the parties were in agreement, shall resolve the matters on which the parties were not in agreement, and shall, in making its award, give due consideration to those matters on which the parties were in tentative agreement. Such award shall be binding on both the carrier and organization parties to the dispute and shall constitute a complete and final disposition of the aforesaid issues covered by the decision of the board of arbitration.

"Sec. 4. To the extent not inconsistent with this joint resolution the arbitration shall be conducted pursuant to sections 7 and 8 of the Railway Labor Act [this section and section 158 of this title], the board's award shall be made and filed as provided in said sec-

tions and shall be subject to section 9 of said Act [section 159 of this title]. The United States District Court for the District of Columbia is hereby designated as the court in which the award is to be filed, and the arbitration board shall report to the National Mediation Board in the same manner as arbitration boards functioning pursuant to the Railway Labor Act [this chapter]. The award shall continue in force for such period as the arbitration board shall determine in its award, but not to exceed two years from the date the award takes effect, unless the parties agree otherwise.

"Sec. 5. The arbitration board shall begin its hearings thirty days after the enactment of this joint resolution or on such earlier date as the parties to the dispute and the board may agree upon and shall make and file its award not later than ninety days after the enactment of this joint resolution: *Provided, however,* That said award shall not become effective until sixty days after the filing of the award."

* * * * * * * *

"Sec. 8. This joint resolution shall expire one hundred and eighty days after the date of its enactment, except that it shall remain in effect with respect to the last sentence of section 4 for the period prescribed in that sentence."

* * * * * * * *

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 502

BROTHERHOOD OF RAILROAD TRAINMEN,
Petitioner,

v.

CERTAIN CARRIERS REPRESENTED BY THE EASTERN, WESTERN AND SOUTHEASTERN CARRIERS' CONFERENCE COMMITTEES, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS

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IN THE

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OCTOBER TERM, 1967

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BROTHERHOOD OF RAILROAD TRAINMEN,
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*Respondents.**

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS

Opinions Below

The opinion of the Court of Appeals (Pet. App. A), not yet officially reported, is unofficially reported at 55 CCH Labor Cases ¶ 11,913. The opinion of the District Court (JA 119-121) is not reported.

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* For reasons best known to itself, petitioner has included as respondents in the caption of its petition "Certain Carriers Represented by the Eastern, Western and Southeastern Carriers' Conference Committees" in addition to the named individual railroad on whose behalf this brief is filed. The only railroad named as respondent below was that railroad—the Terminal Railroad Association of St. Louis. In order to avoid confusion, however, we have adopted the caption utilized by petitioner.

Jurisdiction

The jurisdictional requisites are adequately set forth in the petition.

Questions Presented

1. Whether Arbitration Board No. 282 retains its primary jurisdiction of disputes as to the meaning and application of its Award, under Sections 7 and 8 of the Railway Labor Act (45 U.S.C. §§ 157, 158), although P.L. 88-108 (77 Stat. 132), which initially ordered the arbitration, now has expired?

2. Whether the Terminal Railroad Association of St. Louis implemented the Award by Arbitration Board No. 282 in a manner that complied with the Award.*

Statement of the Case

In November of 1959, most of the nation's Class I railroads served five unions (including petitioner) with notices under Section 6 of the Railway Labor Act (45 U.S.C. § 156) of proposed changes in a number of obsolete rules which were causing serious overmanning of trains. One of the proposals thus made was to abolish all rules requiring the use of trainmen in road and yard service, and to permit

---

* This second question, corresponding to the second question purportedly presented by the petition (Pet. 2), would arise only if the Court of Appeals were reversed with respect to its holding that the dispute involved in this case is within the primary jurisdiction of Arbitration Board No. 282. However, the court below did not pass upon the question, and petitioner has not discussed it in its statement of "reasons for granting the writ," as required by Rule 23(f) of the Rules of the Court (1967). Moreover, the question obviously is not of general importance but instead concerns only the merits of a dispute as to the manner in which a particular railroad implemented a particular arbitration award, the effective period of which has now expired. See pp. 3-5, *infra*. We submit, therefore, that the question has not properly been presented for review and in any event is not an appropriate question for review.

management, in its discretion, to determine the number of trainmen to be used. In September of 1960, the unions served the railroads with Section 6 notices of various counterproposals, including a proposal by petitioner to establish a rule requiring the use of at least two trainmen on all crews in road and yard service. The parties then exhausted the "major" dispute procedures of the Railway Labor Act (45 U.S.C. §§ 151-160) without settling the dispute, and thus were in a position to resort to self help including strikes by the unions. See *Locomotive Engineers* v. *B. & O. R. Co.*, 372 U.S. 284 (1963).

To prevent the impending disaster, Congress enacted P.L. 88-108 (77 Stat. 132) in August of 1963. Section 1 of the statute prohibited the use of self help with respect to the issues in dispute. Section 3 committed the crew-consist issue and another issue involving the use of locomotive firemen to final and binding arbitration. Section 4 provided that "to the extent not inconsistent with this joint resolution the arbitration shall be conducted pursuant to sections 7 and 8 of the Railway Labor Act" and that "the board's award shall be made and filed as provided in said sections and shall be subject to section 9 of said Act." The last sentence of section 4 added that the award should continue in force for a period to be determined by the arbitration board, not to exceed two years. Section 6 required the parties to resume bargaining with respect to issues not committed by section 3 to arbitration. And section 8 provided that the "joint resolution shall expire one hundred and eighty days after the date of its enactment, except that it shall remain in effect with respect to the last sentence of section 4 for the period prescribed in that sentence." Section 8 thus lifted the ban on self help imposed by section 1, with respect to issues not committed to arbitration, after a period of time sufficient to allow for bargaining with respect to those

issues, and with respect to the issues committed to arbitration, after the expiration of the effective period of the arbitration award.[1]

In accordance with the joint resolution, an arbitration board (designated as Arbitration Board No. 282) was established to conduct the arbitration pursuant to sections 7 and 8 of the Railway Labor Act. Section III of the Award by Board 282 dealt with the crew-consist issue. Section III provided that existing rules requiring "stipulated" numbers of trainmen would temporarily remain in effect; that either party to such a rule might serve the other with a notice of proposed changes; that the parties should confer for the purpose of attempting to reach agreement upon the proposal in the light of specified "guidelines"; and that, if no agreement were reached, the dispute might be submitted by either party to a special board of adjustment for final decision pursuant to the specified guidelines (JA 14-19).

Petitioner and three others unions filed petitions to impeach the Award, pursuant to section 9 of the Railway Labor Act (45 U.S.C. § 159), but the validity of the Award was sustained. *Brotherhood of Loc. Fire. & Eng.* v. *Chicago, B. & Q. R. Co.*, 225 F. Supp. 11 (D. D.C., 1964), *aff'd per curiam*, 331 F. 2d 1020 (D.C. Cir., 1964), *cert. den.*, 377

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[1] "As amended by the committee, [section 8] provides that this joint resolution will expire 150 days [later changed to 180 days] after the date of its enactment with respect to all issues except the two principal issues. With respect to the two principal issues, the resolution will remain in effect insofar as concerns the provisions of the last sentence of section 4. That sentence provides that the arbitration award covering the fireman (helper) and crew consist issues will continue in effect for a period not to exceed 2 years from the date it takes effect unless the parties agree to a different period. This means that no change in rates of pay, rules, or working conditions, and no strike or lockout over any dispute involving these matters, may occur with respect to these issues covered by arbitration for 2 years after the arbitration award is filed, except by agreement of the parties." H.R. Rep. No. 713, 88th Cong., 1st Sess., p. 15.

U.S. 918 (1964). The Award became effective with respect to the crew-consist issue on January 25, 1964, and remained in effect for two years thereafter, through January 25, 1966. *Id.*, at 16; *Brotherhood of Railroad Trainmen* v. *Akron & Barberton Belt R. Co.*, — F. 2d —, 55 CCH Labor Cases ¶ 11,912 (D.C. Cir., 1967), supplemental opinion, — F. 2d —, 56 CCH Labor Cases ¶ 12,095 (D.C. Cir., 1967).

In January of 1964, pursuant to section III of the Award by Board 282, respondent served petitioner with a notice proposing changes in rules requiring a specified number of trainmen on certain crews. The proposal ultimately was referred to a special board of adjustment. That board rendered its award in October of 1964. The award (JA 24-45) authorized respondent to reduce by one member the "consist" of a number of crews and denied respondent's proposal in certain other respects (JA 68).

In May of 1965, respondent implemented the award in the manner that gave rise to the present litigation, after three earlier attempts by respondent to implement the award in a manner satisfactory to petitioner had failed to satisfy petitioner (JA 68-71, 174-178). Specifically, respondent permanently discontinued a number of the positions which it had been authorized to discontinue by the special board award, thereby forcing certain employees to respondent's extra boards where the employees are used to fill temporary vacancies as they arise (JA 71-73). Respondent was of the view that its action in that respect was proper under the Award by Board 282. The Award provided that no employee "shall have any right to jobs or positions that the carrier may discontinue pursuant to the provisions of this Award if other employment [in road or yard service], for which such employee is qualified, is available to him in his seniority district" (JA 19), and Board 282 has ruled that under that provision carriers may force

employees to the extra boards to meet the needs of such boards by discontinuing positions which are subject to discontinuance under special board awards (Pet. App. 5a-8a; JA 125, 134-135, 146-147). Petitioner claimed, however, that the men forced to respondent's extra boards had not received "other employment" within the meaning of Award 282 and, therefore, that the men were entitled to work in the discontinued positions (JA 20-23).

Section 7 Third (c) of the Railway Labor Act (45 U.S.C. § 157 Third (c)) provides for the reconvening of arbitration boards to resolve disputes as to the meaning and application of arbitration awards, and section 8(m) of the Act (45 U.S.C. § 158(m)) provides that "any difference arising as to the meaning, or the application of the provisions, of an award made by a board of arbitration shall be referred back for a ruling to the same board . . . ." Pursuant to those provisions, numerous disputes as to the meaning and application of the Award by Board 282 have been referred to Board 282 (see JA 121-153; Pet. 3-4, 5), and on April 15, 1965, the United States Court of Appeals for the District of Columbia Circuit ruled that such disputes as to the meaning and application of the Award must be decided initially by Board 282 rather than by the courts. *Brotherhood of Railroad Train.* v. *Chicago, M., St. P. & P. R. Co.*, 345 F. 2d 985 (D.C. Cir., 1965). *Accord: Brotherhood of Railroad Trainmen* v. *Certain Carriers, Etc.*, 349 F. 2d 207, 210 (D.C. Cir., 1965); *New York, C. & St. L. R. Co.* v. *Brotherhood of Loc. Fire. & Eng.*, 358 F. 2d 464, 468-469 (6th Cir., 1966); *Brotherhood of Railroad Trainmen* v. *Missouri Pac. R. Co.*, 230 F. Supp. 197, 202 (E.D. Mo., 1964); *In re Certain Carriers*, 229 F. Supp. 259, 260 (D. D.C., 1964).

Nevertheless, petitioner did not submit its contention that respondent had misinterpreted and misapplied Award 282 to Board 282 for a ruling in accordance with sections 7 and

8 of the Railway Labor Act. Instead, in January of 1966, some eight months after respondent had implemented the special board award in the manner to which petitioner objects and shortly before the expiration of the period during which the Award by Board 282 remained in effect, petitioner filed a motion for supplemental relief in the United States District Court for the District of Columbia, seeking an order requiring respondent to compensate individual employees affected by respondent's allegedly improper application of the Award and compelling respondent to comply with petitioner's disputed interpretation (JA 20-23).

The District Court determined that "although the question is not as clear as counsel seem to argue," the "necessary inference or implication" from previous rulings by Board 282 was that the employees represented by petitioner were "not entitled to be assigned to work in positions that have been abolished" (JA 120). Therefore, the District Court denied the motion for supplemental relief "without prejudice, however, to its renewal if the question is submitted to Board 282 and a different conclusion is reached by that Board" (JA 121).

Petitioner appealed from that determination (JA 80), contending that respondent had violated the Award by Board 282, and that the District Court therefore should have granted the requested relief. During oral argument, counsel for petitioner was asked why petitioner had not submitted its contentions as to the meaning and application of the Arbitration Award to Board 282 for a ruling. In response, counsel advised the court that petitioner had not done so because the Arbitration Award was "unambiguous." Then, in addition, he suggested that in any event it was by then too late to submit the dispute to Board 282 because, as the Court of Appeals characterized the contention, "there

was some doubt whether the Board continued to exist or had jurisdiction to interpret its own award after the expiration of the award in January 1966" (Pet. App. 9a).

Relying on its previous holdings to the same effect, see p. 6, *supra*, the Court of Appeals concluded that the parties' dispute as to the meaning and application of Award 282 was within the primary jurisdiction of Board 282 under sections 7 and 8 of the Railway Labor Act. In so holding, it addressed and rejected petitioner's "suggestion" that Board 282 had lost its primary jurisdiction of such disputes when its Award expired in January 1966 (Pet. App. 9a-10a):

> ". . . We must take cognizance of this question, if the parties are not to be left in limbo.
>
> "We think that both in reason and in law Arbitration Board No. 282, despite the statutory limitation on the period to be governed by its award, must have the power to make its award effective during that period by interpretation. We find support for this view in P.L. 88-108 itself. Section 4 provides that 'To the extent not inconsistent with this joint resolution the arbitration shall be conducted pursuant to sections 7 and 8 of the Railway Labor Act, the board's award shall be made and filed as provided in said sections and shall be subject to section 9 of said Act. . . .' Referring to section 8 of the Railway Labor Act (45 U.S.C., § 158), we note that while paragraph (j) requires a specific limitation on 'the period during which the award shall continue in force', paragraph (m) provides that 'any difference arising as to the meaning, or the application of the provisions, of an award made by a board of arbitration shall be referred back for a ruling to the same board. . . .' We see no reason why this sensible provision can be said to be 'inconsistent' with the objectives of P.L. 88-108, and therefore we hold

> that Arbitration Board 282 retains similar power to pass upon differences arising out of the contentions of these parties as to the meaning or application of Section III-D of the award. Congress, seeking 'a complete and final disposition', must have intended that the Board's interpretations must determine the boundaries of rights, privileges, and obligations of the parties with respect to the two-year period specified. It could not have intended that an hiatus exist as to this period, or, alternatively, a mixed application of Board and court rulings."

Petitioner sought a rehearing on the ground, among others, that the Court of Appeals' ruling was incorrect because P.L. 88-108 had expired (Pet. 4). However, the Court of Appeals denied the petition for rehearing without opinion (Pet. App. 11a), and petitioner now seeks review by this Court.

Argument

The question presented[2] is neither the subject of conflicting decisions nor a question of general importance. Rather, it concerns the effect of the expiration of a statute intended by the Congress to be a "one-shot" solution for a particular railway labor dispute[3] on the powers of a particular arbitration board under the Railway Labor Act. Moreover, the question was rightly decided below.

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[2] The discussion herein deals only with the question discussed in petitioner's statement of reasons for granting the writ (Pet. 5-8)—the question as to the primary jurisdiction of Board 282 with respect to the dispute involved in this case. Petitioner's statement of the questions presented (Pet. 2), however, includes an additional question, as to which see the footnote to our statement of the questions presented, p. 2, *supra*.

[3] "[The joint resolution] is what it purports to be—a one-shot solution through legislative means to a situation which imperiled beyond question the economy and security of the entire Nation." S. Rep. No. 459, 88th Cong., 1st Sess., p. 7; see also H.R. Rep. No. 713, 88th Cong., 1st Sess., p. 13.

1. As noted above, by command of the Congress the arbitration by Board 282 was conducted and the Board's Award was made "pursuant to sections 7 and 8 of the Railway Labor Act" (P.L. 88-108, § 4). However, the petition does not purport to present any question as to the construction and application of sections 7 and 8 apart from the effect thereon of the expiration of P.L. 88-108. Nor could it.

It is well established that disputes as to the meaning and application of an arbitration award made pursuant to sections 7 and 8 must be referred initially to the arbitration board and may not be resolved by the courts. As the court below held, that is plainly required by section 8(m), which provides that "any difference arising as to the meaning, or the application of the provisions, of an award made by a board of arbitration shall be referred back for a ruling to the same board" (45 U.S.C. § 158(m); see also 45 U.S.C. § 157 Third (c)). Cases that have dealt with the question have so held without exception. See decisions cited at p. 6, *supra; Western Air Lines* v. *Labor Commissioner*, 167 F. 2d 566 (9th Cir., 1948).

It is equally clear that the expiration of an arbitration award made pursuant to sections 7 and 8 does not affect the arbitration board's primary jurisdiction to resolve disputes as to the meaning and application of the award. The reasons for requiring an arbitration board to construe its award rather than permitting other tribunals to do so (see Pet. App. 8a-9a) are as relevant to disputes which remain undecided at the expiration of the award as they are to disputes which the board resolves prior to that time. Consequently, sections 8(h) and 8(i) of the Railway Labor Act provide for limitation of the time in which an arbitration board must commence its hearings and make and file its award, and (as the court below observed) section 8(j) provides for limitation of "the period during which the award shall continue in force" (45 U.S.C. § 158(h)-(j)), while

section 8(m) provides, without limitation as to time, that "any difference" as to the meaning and application of an arbitration award "shall be referred back" to the arbitration board (45 U.S.C. § 158(m)).

Thus, the decision below presents no general question as to the requirements of the Railway Labor Act. The holding below as to the powers of Board 282 was unexceptionable so far as sections 7 and 8 are concerned. The only question presented, therefore, concerns the effect of the expiration of P.L. 88-108 on a power that other arbitration boards unquestionably would have in similar circumstances—the power under sections 7 and 8 to determine disputes as to the meaning and application of awards made (as was the Award by Board 282) "pursuant to sections 7 and 8."

2. On no ground can the question as to the effect of the expiration of P.L. 88-108 on the powers of Board 282 under sections 7 and 8 be characterized as appropriate for review by this Court.

a. The question is not of general importance. It concerns only the effect of the expiration of a "one-shot" statute, see p. 9, at n. 3, *supra*, on the powers of a particular arbitration board. Now that the periods during which P.L. 88-108 and the Award by Board 282 were in effect have expired, there are not likely to be many future disputes over the meaning and application of the Award by Board 282 with respect to which the question would be relevant.[4] And the question could arise with respect to a future arbitration award only if the Congress were to enact

[4] Although there is no support in the record for the statement, petitioner is accurate in stating that Board 282 "has not decided any [disputes as to the meaning and application of its Award] since its expiration, and those submitted to it during its life and not decided, and others, remain undecided" (Pet. 5). We are not, however, aware of the existence of many such disputes.

another "one-shot" law identical to P.L. 88-108 some time in the future.

b. The question is not the subject of conflicting decisions. On the contrary, the only other decision which might be said to be relevant with respect to the effect of the expiration of P.L. 88-108 on the power of Board 282 to entertain disputes as to the meaning and application of its Award is *New York, C. & St. L. R. Co.* v. *Brotherhood of Loc. Fire. & Eng., supra,* 358 F. 2d 464 (6th Cir., 1966). In that case the Sixth Circuit held, one day before the expiration of the provisions in the Award relating to firemen,[5] that a debatable question as to the meaning and application of those provisions should be referred to Board 282.

c. The question was rightly decided below. To be sure, Board 282 was established by P.L. 88-108, and P.L. 88-108 has now expired. In the meantime, however, in accordance with the command of the Congress, Board 282 made an award "pursuant to sections 7 and 8 of the Railway Labor Act" (P.L. 88-108, § 4). As already noted, the Railway Labor Act itself provides that disputes as to the meaning or application of an award made pursuant to sections 7 and 8 "shall be referred back for a ruling" to the board that made the award and provides for the reconvening of the board for that purpose. Therefore, the authority of Board 282 with respect to the dispute involved in this case derives not from P.L. 88-108, but directly from the Railway Labor Act. As petitioner rightly observes, the Railway Labor Act "has not expired" (Pet. 6).[6]

---

[5] The case was decided March 29, 1966. The effective period of the provisions relating to firemen in the Award by Board 282 ended on March 30, 1966, by virtue of stipulations between the parties entered into pursuant to Section 4 of P.L. 88-108 and Section IV of Award 282 (JA 19). See *Brotherhood of Railroad Trainmen* v. *Akron & Barberton Belt R. Co., supra.*

[6] None of the cases cited by petitioner (Pet. 7) involves an even remotely analogous situation. See *Ex Parte McCardle,* 7 Wall. (74 U.S.) 506

The Congress did not intend that the expiration of P.L. 88-108 should deprive Board 282 of powers deriving directly from sections 7 and 8, but included an expiration provision in P.L. 88-108 for the quite different purpose of terminating the ban on self help imposed by section 1 of the statute. See p. 4, at n. 1, *supra*. As the court below concluded, the Congress, seeking a "complete and final disposition" (P.L. 88-108, § 3) of the crew-consist dispute, "must have intended that the Board's interpretations must determine the boundaries of rights, privileges, and obligations of the parties with respect to the two-year period specified" (Pet. App. 10a).[7]

The court's conclusion as to the intent of the Congress in that respect is confirmed by the understanding manifested by all who have had any responsibility for the administration of P.L. 88-108, in connection with previous disputes as to the meaning and application of the Award by Board 282. The expiration clause in P.L. 88-108 provided for the expiration of the statute 180 days after the date of its enactment. Therefore, petitioner's theory that the expiration of P.L. 88-108 deprived Board 282 of the power to rule

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(1869); *Carpenter* v. *Wabash Ry. Co.*, 309 U.S. 23 (1940); *Hines* v. *Davidowitz*, 312 U.S. 52 (1941); *American Foundries* v. *Tri-City Council*, 257 U.S. 184 (1921); *Bruner* v. *United States*, 343 U.S. 112 (1952); *Brotherhood of Rail. Train.* v. *Denver & R. G. W. R. Co.*, 370 F. 2d 833 (10th Cir., 1966), *cert. den.*, 386 U.S. 1018 (1967).

[7] Petitioner claims that there is an inconsistency between the holding that Board 282 retains its power under sections 7 and 8 of the Railway Labor Act to entertain disputes as to the meaning and application of its Award, and the holding in *Brotherhood of Railroad Trainmen* v. *Akron & Barberton Belt R. Co.*, *supra*, that the powers of the parties to take certain procedural steps authorized by the Award by Board 282 terminated when the Award expired (Pet. 6-7). While the carriers disagree with the holding in *Akron & Barberton* to which petitioner refers, it is sufficient here to note that the two issues have nothing in common. This case concerns powers of Board 282 which derive from sections 7 and 8 of the Railway Labor Act, which have not expired, while the issue in *Akron & Barberton* to which petitioner refers concerned powers which derive from the Arbitration Award, which has expired.

on disputes as to the meaning and application of the Award would apply not only to rulings following the expiration of the Award in January 1966, but to any ruling made by the Board after the expiration of P.L. 88-108 in February 1964.[8] Yet Board 282 rendered hundreds of rulings as to the meaning and application of its Award between February 1964 and January 1966, and on no occasion did Board 282, or the National Mediation Board, or any court, or any party to the Award, question the power of Board 282 to make such rulings. Indeed, in Nos. 499, 500, and 501, petitioner itself is now seeking review by this Court of three such rulings but has not questioned the power of Board 282 on this ground.

d. Moreover, even if petitioner were right in contending that the expiration of P.L. 88-108 deprived Board 282 of the power to rule on disputes as to the meaning and application of its Award, the decision below nevertheless would have to be affirmed. In its motion for supplemental relief, petitioner sought relief with respect to individual employees' claims and grievances premised upon respondent's alleged violation of the Award by Board 282 (JA 20-23). However, the National Railroad Adjustment Board has exclusive jurisdiction of such individual claims and grievances under section 3 of the Railway Labor Act (45 U.S.C. § 153).[9]

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[8] P.L. 88-108 was enacted on August 28, 1963. The expiration clause in the statute provided that "this joint resolution shall expire one hundred and eighty days after the date of its enactment, except that it shall remain in effect with respect to the last sentence of section 4 for the period prescribed in that sentence" (P.L. 88-108, § 8). Therefore, the statute expired in February 1964. The exception regarding "the last sentence of section 4" does not affect the matter in any way relevant here, because the last sentence of section 4 provided only that the "award shall continue in force for such period as the arbitration board shall determine . . . not to exceed two years"—not that Board 282 should continue in existence for a period of two years.

[9] *Locomotive Engrs.* v. *L. & N. R. Co.*, 373 U.S. 33, 38 (1963); *Pennsylvania R. Co.* v. *Day*, 360 U.S. 548 (1959); *Order of Conductors* v. *Southern R. Co.*, 339 U.S. 255 (1950); *Slocum* v. *Delaware, L. & W. R. Co.*, 339 U.S. 239 (1950); *Order of Conductors* v. *Pitney*, 326 U.S. 561 (1946).

Consequently, the Adjustment Board would have exclusive jurisdiction of the disputed issues if Board 282 did not have primary jurisdiction under sections 7 and 8. Therefore, even if Board 282 has lost the power to resolve the issues in dispute in this case, as petitioner contends, the holding below, that the courts do not have such power, nevertheless is correct.[10]

e. Finally, petitioner states that the "question of the continuing jurisdiction of the arbitration board to make such adjudications [as to the meaning and application of its Award] after the expiration of the statute creating it was not briefed or argued but arose during oral argument in the Court below," and was then briefed by petitioner, for the first time, in its petition for rehearing (Pet. 4). Petitioner's failure to raise the question in a timely fashion and to give the Court of Appeals the benefit of whatever briefing petitioner thinks the issue required are themselves sufficient reasons for denying the writ. See *Lawn* v. *United States*, 355 U.S. 339, 362, n. 16 (1958). Petitioner did not have to wait for oral argument in the Court of Appeals to raise the issue. Respondent has contended from the beginning (1) that its actions were permissible under the Award, and (2) that any debatable question as to the requirements of the Award in that regard must be resolved by Board 282 and cannot be resolved by the courts (JA 113-114).

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[10] If that were not so, the expiration of the Award either would have left "an hiatus"—no tribunal would have jurisdiction to resolve disputes as to the meaning and application of the Award by Board 282—or, alternatively, would have transferred jurisdiction from Board 282 to the courts, with a resulting "mixed application of Board and court rulings"—as the court below observed (Pet. App. 10a). The first of those undesirable alternatives obviously could not have been intended by the Congress, and the second would be wholly inconsistent with the intent implicit in the statutory command that the Arbitration Board should provide a "complete and final disposition" (P.L. 88-108, § 3) of the crew-consist dispute. See pp. 8-9, *supra*.

Conclusion

For the reasons stated above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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(2457-0)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 502

BROTHERHOOD OF RAILROAD TRAINMEN, *Petitioner*,

v.

CERTAIN CARRIERS REPRESENTED BY THE EASTERN, WESTERN & SOUTHEASTERN CARRIERS CONFERENCE COMMITTEES, THE TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS, *Respondents*.

PETITIONER'S REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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1. Certain cases cited by the Carriers on page 6, decided by the Court below, have been superseded by later decisions of that Court holding that certain procedural issues are *res judicata*. Petitions for certiorari in such later cases are now pending in this Court, Nos. 499, 500, and 620. This situation emphasizes the confusion heretofore engendered by the decisions in this area calling for clarification and definition by this Court.

2. On page 7 of the Opposition the Carriers state that in January, 1966, the Brotherhood brought suit instead of going to Arbitration Board No. 282 for an interpretation. This was done because the Brotherhood believed that the basic issue had been clearly answered by earlier interpretations of Board 282, and because it believed that Board 282 would cease to exist in a few days and thus could not answer requests for interpretations. In footnote 4 on page 11, the Carriers concede that Board 282 has issued no answers to requests for interpretation since the expiration of the award almost 2 years ago, although some such requests that had been submitted prior to the expiration of the award have not been answered.

3. At various places in their Opposition, on page 10 and elsewhere, the Carriers refer to Award 282 as having been made "under" or "pursuant to" sections 7 and 8 of the Railway Labor Act. Such representations are misleading although the quotation is literally accurate from Public Law 88-108. By beginning a quotation in the middle of a sentence the Carriers may make it appear that Award 282 was an award under sections 7 and 8 of the Railway Labor Act. But section 4 of Public Law 188 provides that "the arbitration shall be *conducted* pursuant to sections 7 and 8 of the Railway Labor Act." (Emphasis added.) There is not a word in P.L. 88-108 or elsewhere providing or even hinting that the consequences of the award of Board 282 should be the same as the consequences of arbitration awards made under sections 7 and 8 of the Railway Labor Act; it is provided only that the procedures should be conducted in accordance with sections 7 and 8.

4. On page 11, in point 2(a), the Carriers say that the issue here is not of importance because there are not likely to be many disputes concerning the interpretation of Award 282. But, if as the Court below held in other cases, the rules established by or pursuant to Award 282 continue in effect until changed in accordance with the procedures of the Railway Labor Act, there may be thousands of such additional disputes in the indeterminate future. Indeed, on page 14 of the Opposition the Carriers point out that in less than two years Board 282 made hundreds of interpretations pursuant to requests presented to the Board and there are some that remain unanswered.

5. On page 12 the Carriers state that the authority of Board 282 now derives not from P.L. 88-108 but directly from sections 7 and 8 of the Railway Labor Act. This is an astonishing assertion. Everyone must agree now that P.L. 88-108 has expired and it must be plain that any incorporating of any provisions of the Railway Labor Act into P.L. 88-108 expired with the expiration of P.L. 88-108. Absent the continued existence of P.L. 88-108, the authority of Board 282 to do anything would derive from a non-existent statute.

6. On page 13 the Carriers state that all the parties concerned understand that Arbitration Board 282 continued to exist after the expiration of P.L. 88-108, since requests for interpretations were made after the expiration of 180 days after the enactment of the Statute. They refer to Petitions Nos. 499, 500, and 501 involving interpretations made more than 180 days after the enactment of P.L. 88-108.

P.L. 88-108 provided in section 8 that it should expire 180 days after the date of its enactment except

for certain purposes, and for those purposes would expire two years after the date the award should take effect. It is not clear for what purposes the Act expired at the end of the period of 180 days or at the end of the two-year period. It is clear that none of the Unions requested anything of Board 282 after the two-year period nor has the National Mediation Board done so.

7. On page 14 the Carriers say, and assume the validity of the statement, the the National Railroad Adjustment Board has exclusive jurisdiction of claims and grievances arising by reason of Award 282. The cases they cite in footnote 9 in support of that assertion have no relevance to such assertion. Indeed, that is one of the issues in unrelated litigation now pending in the Court below, No. 20,378, *Southern Pacific Co.* v. *Brotherhood of Locomotive Firemen and Enginemen.*

8. On page 14 the Carriers say also, in footnote 8, that Congress meant that the award was to continue in effect for not more than two years, not that Board 282 should continue in effect for no longer than that period. But Congress very plainly provided that P.L. 88-108 should not be in effect for any purpose after two years, and with the statute no longer in effect it is difficult to comprehend how the Board can be in effect. Suppose that if instead of Congress enacting P.L. 88-108 and providing that it should expire at the end of the two-year period it had enacted the statute without any expiration provisions and at the end of the two-year period had repealed it, nobody would contend that somehow the agency created in the first statute continued in existence after the repeal of the statute creating it. It is not perceived how includ-

ing the expiration in the first statute differs in an
degree of substance from enacting the expiration late

Respectfully submitted,

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September, 1967

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 502

BROTHERHOOD OF RAILROAD TRAINMEN, *Petitioner*,

v.

CERTAIN CARRIERS REPRESENTED BY THE EASTERN, WESTERN & SOUTHEASTERN CARRIERS CONFERENCE COMMITTEES, THE TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS, *Respondents*.

PETITIONER'S SUPPLEMENTAL BRIEF IN REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

On August 16, 1967, Petitioner filed its petition for a writ of certiorari in this case. On September 15, 1967, Respondent filed its Brief in opposition, in which it stated that the basic issue in this case, whether Board 282 continues to exist after the expiration of the statute that created it, is not important because "there are not likely to be many future disputes over the meaning and application of the award by Board 282". Page 11 of Opposition. On September 28, 1967 Petitioner filed a Reply to that Opposition.

On September 25, 1967 an action was filed in the United States District Court for the District of Columbia by one of the "certain carriers" in which it showed that hundreds of such disputes had arisen on one railroad system, the Kansas City Southern. That action is styled "The Kansas City Southern Railway Company, et al. v. Brotherhood of Railroad Trainmen, et al," Civil Action No. 2453-67. In that action they contend that Board 282 has exclusive jurisdiction to consider interpretations and applications of that Board's Award even to the exclusion of other tribunals to which the parties agreed to submit the disputes for final resolution.

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